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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

J. MICHAEL MURPHY,

PETITIONER,

v.

DIVERSIFIED PRODUCTS CORPORATION, INC.
AND STEPHEN J. O'BRIEN,

RESPONDENT.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

Reply to Respondents Brief In Opposition

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Reply to Respondents Brief In Opposition

Respondent begins his brief in opposition by mischaracterizing the arguments made in the petition and by falsely claiming that said arguments are new, and thus waived. The arguments made in the petition, identical to the ones raised in the district court and the Eleventh Circuit, are: first, the employment agreement is not an ERISA plan (petition at 9 and App. 37a-38a); second, even if the employment agreement

is an ERISA plan, Mr. Murphy's claims are not preempted because he was not a participant under the employment agreement and applying 29 U.S.C. 1144(a) would leave an innocent defrauded victim without any remedy, (petition at 11-13 and Appellant's Brief to the Eleventh Circuit at 13, 14) and; finally, that Congress did not intend to preempt these types of claims when doing so would allow a deceitful employer to escape accountability (petition at 13,14 and Appellant's brief to the Eleventh Circuit at 13, 14). Respondent's contention that these argument were not advanced before is contradicted by the citations in the record given above.

However, as to the first issue of whether the employment agreement is an ERISA plan, it is irrelevant whether that issue was raised before because it implicates the subject-matter jurisdiction, or lack thereof, of the district court. The district court's jurisdiction is premised on a conclusion that the employment agreement is an ERISA plan that arises under the statutes of the United States.[1] If this Court follows its own precedent set forth in *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1 (1987) and finds that the employment agreement is not an ERISA plan, then it should remand the case to the district court with instructions to remand to the State Circuit Court for lack of subject-matter jurisdiction.

As respondent should know, the issue of subject-matter jurisdiction can NEVER be waived. *See, e.g. Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 377 n.21 (1978); *Sosna v. Iowa*, 419 U.S. 393, 398 (1975); *California v. LaRue*, 409 U.S. 109, 112, n.3 (1972); *American Fire and Casualty Co. v. Finn*, 341 U.S. 6, 17-18 (1951); *Mitchell v. Maurer*, 293 U.S. 237,244 (1934); *Jackson v. Ashton*, 8 Pet. 148,149

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[1] *See* 28 U.S.C. § 1331.

(1834). This Court has explicitly held, "the cases are legion holding that a party may not waive a defect in subject-matter jurisdiction or invoke federal jurisdiction simply by consent." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 26 (1989) (Stevens, J., concurring). Respondent's inexplicable request that this Court ignore a possible defect in subject-matter jurisdiction and not consider the *Fort Halifax* issues, in contravention of over one hundred sixty years of precedent, is extraordinary.

After respondent's specious waiver arguments addressed above he began his opposition on the merit by, once again, mischaracterizing the arguments in the petition. Respondent's claim that Mr. Murphy argues that, "his state law claims... relate solely to paragraph 9(d), rather than the employment agreement as a whole"[2] is not found anywhere in the petition. Mr. Murphy, consistent with his position all along,[3] claims that the entire employment agreement is not an ERISA plan under the guidelines of *Fort Halifax*. Since the employment agreement is not an ERISA plan, there can be no preemption, as the district court lacks jurisdiction.

The "golden parachute" provision of the employment agreement is cited by the petition because it happens to be the specific provision Mr. Murphy was defrauded out of by respondent's deplorable conduct. However, the entire employment agreement lacks any ongoing administrative scheme, which is required under *Fort Halifax* before a finding that employee benefits actually become an employee benefit plan under ERISA's umbrella. *See Fort Halifax,* 482 U.S. at 12. All of the benefits in the employment agreement, whether the "golden parachute" in section 9(d)

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[2] *See* Respondent's brief at 7.

[3] *See* Petition at 9.

or the other severance provisions is sections 9(b) or 9(c), simply require a simple computation of an amount of money to be paid to the employee, if the conditions set forth in those sections come to fruition. (App. 24a-33a). Therefore, the entire agreement does not satisfy the *Fort Halifax* requirements.

Respondent properly concedes that, "ERISA does not preempt law relating to a benefit that is not provided as part of a plan that does not require an administrative scheme."[4] Since the employment agreement here, especially section 9(d) which was triggered when DP was sold, provides only for a one-time lump sum payment upon termination and does not contemplate any administrative scheme, it is not an employee benefit plan covered by ERISA. "The requirement of a one-time, lump sum payment triggered by a single event requires no administrative scheme whatsoever ..." *Fort Halifax* at 12.

Respondent fails to cite any authority holding that employment agreements, like the one in this case,[5] constitutes an ERISA plan. This is understandable given the obvious conclusion that writing a check upon termination does not require any ongoing administrative scheme and thus, it cannot be an ERISA plan. Lastly, respondent's failure to distinguish the cases cited in the petition, holding that benefits like the ones in this employment agreement are not ERISA plans demonstrates the futility of any

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[4] Respondents brief at 10.

[5] *See Delaye v. Agripac, Inc.*, 39 F.3d 235 (9th Cir 1994), *Cert. Denied*, ____ U.S. ____, 115 S.Ct. 1402 (1995), where the court held that an employment agreement similar to the one in this case was not an employee benefit plan under ERISA and dismissed the case for lack of subject-matter jurisdiction.

argument which claims that the employment agreement is an ERISA plan.

Mr. Murphy's argument, in lieu of a ruling that the employment agreement is not an employee benefit plan, is that Congress did not intend for preemption to operate when it enures to the detriment of a defrauded victim, leaving him without a remedy under either federal or state law. The petition argues, and the fifth, sixth, and ninth circuits have ruled, that ERISA will not preempt the state law claims of a plaintiff who is not a "participant" or "beneficiary" under ERISA's civil enforcement scheme delineated in 29 U.S.C. 1132.[6] Respondent's attempt to distinguish these cases, cited in the petition for this proposition, is unpersuasive. (Respondent's brief at 15). All of these cases hold, in accordance with the standard established by this court,[7] that preemption will not apply unless the plaintiff is a participant under the specific plan in question.

In response to this argument, respondent cites four cases in which different courts hold that various state claims are preempted. (Respondent's brief at 13). What respondent leaves out, however, is that all of these cases involve the preemption of claims brought by participants of the benefit plans. The plaintiffs in the cases cited by respondent, unlike Mr. Murphy, could have sued their employers under ERISA. Mr. Murphy does not have that luxury because he was fraudulently induced to abandon his rights in the employment agreement in this case in

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[6] These opinions are discussed in the petition at pages 11-15).

[7] *See Ingersell-Rand Co. v. McClendon*, 498 U.S. 133 (1990).

favor of the less attractive retirement agreement.

Specifically, one of the cases cited by respondent held that the plaintiff was a participant in the disputed plan, and the First Circuit gave him standing to pursue an ERISA claim. *Vartanian v. Monsanto Co.*, 14 F.3d 697, 703 (1st Cir 1994). Furthermore, the First Circuit refused to fashion a federal common law remedy on the basis that they had already provided plaintiff with a remedy under ERISA. *Id.* Since Mr. Murphy was defrauded out of signing the employment agreement and lacks standing to bring an ERISA claim, it would be unseemly to deny him any recovery for the contemptible conduct that respondent perpetrated on him.

The basis of the argument that preemption should not apply where the injured party is not a participant springs from this Court's rulings of when preemption will apply. In *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 135 (1990), this Court held that preemption will occur if the claim in question is one that Congress intended to be preempted. Allowing participants of a benefit plan to chose a state claim rather than ERISA as a cause of action would clearly frustrate the uniform body of law that Congress tried to create.

However, where the injured party is not a participant and is precluded from maintaining a claim under ERISA, allowing him to proceed with a state claim will in no way affect the uniform body of employee benefit law established by Congress. Conversely, leaving persons like Mr. Murphy without any remedy would contravene the stated goal of ERISA which is to protect employees from employer misconduct. *See* 29 U.S.C. 1001(b).

Finally, respondent's brief fails, in every way, to address the public policy fallout that

would result from the ruling they request. The message to deceitful employers would be unmistakable: as long as you completely defraud an employee out of a plan, he will neither have a federal claim under ERISA nor a state common-law claim. All of the noble policies underlying the passage of ERISA as well as the fundamental tenants of American justice (that one cannot commit a wrong upon another without being accountable) could be subverted by deceitful employers.

Mr. Murphy is not asking this Court to fashion a new federal remedy. He is simply asking this Court to interpret the statute in a way that will both carry out the will of Congress and allow the injured to recover. Mr. Murphy's arguments are compelling and have been accepted and applied by other circuits. Only this Court can now put a stop to this miscarriage and allow Mr. Murphy his day in court. This Court typically grants certiorari in matters involving important federal questions with conflicting authority in the circuits. This case satisfies those requirements.

CONCLUSION

For the foregoing reasons, petitioner urges this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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